No. 78-249

# In the Supreme Court of the United States

OCTOBER TERM, 1978

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FEDERAL ENERGY REGULATORY COMMISSION,
PETITIONER

*v.*

BILLY J. MCCOMBS, ET AL.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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WADE H. MCCREE, JR.,
*Solicitor General,*
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## CITATIONS

Cases:

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*v.*

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The Solicitor General, on behalf of the Federal Energy Regulatory Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*)[1] is reported at 570 F.2d 1376. The orders of the

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[1] "A" refers to the separately bound appendix to the petition filed in *United Gas Pipe Line Company* v. *McCombs, et al.*, No. 78-17, seeking review of the same judgment. To

Federal Power Commission (Opinion Nos. 740 (A-1 to A-45) and 740-A (A-46 to A-69)) are reported at 54 FPC 755 and 2034. Opinion No. 740-B (A-70 to A-80) is not yet reported.[2]

## JURISDICTION

The judgment of the court of appeals was entered on February 9, 1978 (A-94), and an order denying timely petitions for rehearing and suggestions for rehearing *en banc* was reissued as of April 4, 1978, for the purpose of correcting a clerical error, on April 6, 1978 (A-95 to A-96). By order of July 25, 1978, Mr. Justice White extended the time for filing a petition for a writ of certiorari to August 14, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 52 Stat. 831, as amended, 15 U.S.C. 717r (b).

## QUESTION PRESENTED

Whether a court of appeals, reviewing a Commission determination that gas currently flowing from a tract is dedicated to interstate commerce, may independently determine that the certificated gas serv-

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relieve the Court of unnecessary additional documents, we have agreed with petitioner in that case, with the consent of the Clerk of this Court, to use jointly and share the expenses of only one separately bound appendix. We have, however, included the opinion of the court of appeals as an appendix to this petition, *infra*.

[2] An earlier opinion of the court of appeals (A-81 to A-91), subsequently vacated and withdrawn (A-93), is reported at 542 F.2d 1144.

ice was abandoned under Section 7(b) of the Natural Gas Act because production from the tract had ceased between 1966 and 1971, even though the permission of the Commission for abandonment was never sought or obtained as required by Section 7(b).

## STATUTE INVOLVED

Section 7(b) of the Natural Gas Act, 52 Stat. 824, 15 U.S.C. 717f(b), provides:

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

## STATEMENT

This case results from proceedings before the Federal Power Commission on a complaint by United Gas Pipe Line Company ("United") alleging that respondents [3] were violating the Natural Gas Act,

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[3] Respondents are "the McCombs Group" (Billy J. McCombs, R. James Stillings d/b/a Gastill Company, David A. Onsgard, Basin Petroleum Corporation, Louis H. Haring, Jr., and National Exploration Company) and "the du Pont Company" (E.I. du Pont de Nemours & Company).

52 Stat. 821, as amended, 15 U.S.C. 717 *et seq.*, by failing to deliver gas that had been dedicated to interstate commerce and to United's pipeline under the terms of a certificate of public convenience and necessity. The gas is being produced from a 163-acre tract known as the Butler B tract in Karnes County, Texas (App., *infra*, pp. 2a-5a).

In 1948, B. C. Butler, Sr., as lessor, executed an oil and gas lease covering the Butler B tract (A-3). In 1953, the leaseholders-producers entered into a gas purchase contract with United whereby they agreed to sell to United all the natural gas produced then or thereafter from the tract (App., *infra*, p. 2a). Following this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, the leaseholders applied to the Commission for certificates of public convenience and necessity authorizing the sale to United of the natural gas covered by the 1953 contract. In December 1954, the Commission granted the certificates (App., *infra*, pp. 2a-3a). There was no provision in the lease, the contract, or the certificates limiting the depth of origin or the amount of gas from the Butler B tract that was committed.

One well, the Butler No. 7 gas well, was completed on the Butler B tract to a depth of 2,960 feet, and gas from this well was delivered to United (A-6). Meanwhile, the Butler B lease was assigned several times, and in March 1966 it came into the ownership of a group headed by Louis H. Haring, Jr. (A-6; App., *infra*, p. 3a). On May 28, 1966, the Butler No. 7 well, which was the only well producing gas on

the lease at that time, ceased production (A-6; App., *infra*, p. 3a).

The property was then being operated for the Haring group ("Haring") by Bay Rock Corporation. On December 5, 1966, Bay Rock notified United that the wells on the lease were depleted "and there will be no other gas available at this time" (A-7; App., *infra*, p. 3a). In response, United advised Bay Rock that it would remove its metering equipment but that it would reinstall the equipment whenever Bay Rock might have further gas to deliver under the contract (*ibid.*). Neither Haring nor Bay Rock sought or obtained the Commission's authorization under Section 7(b) of the Natural Gas Act to abandon the sale to United (*ibid.*).

In August 1968 and January 1971, the Secretary of the Commission wrote to Haring's predecessor and to Bay Rock, respectively, advising them that if no further sales of gas were contemplated, it would be necessary for them to file applications to abandon service (A-97 to A-98, A-100 to A-101; App., *infra*, p. 8a). No such abandonment applications were filed.

In 1971 to 1972, Haring divided the Butler B leasehold horizontally and vertically. Haring assigned the western 50 acres of Butler B, from the depth of 4,115 feet to the depth of 8,700 feet, to National Exploration Company ("National") (A-7 to A-8; App., *infra*, p. 4a). Haring assigned the eastern 113 acres of Butler B, from 6,500 feet to 8,653 feet, to the McCombs Group, who unitized that interest with their interest at the same depths of the adjoin-

ing "Butler A" tract (A-8 to A-9; App., *infra*, p. 4a).[4]

Drilling to these deeper horizons, the new working-interest owners discovered gas. In 1971 and 1972, the McCombs Group drilled four productive wells on their unitized acreage, one of which was on Butler B. On June 1, 1972, the McCombs Group contracted to

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[4] The Butler B lease authorized the unitization of the leasehold, or of any part of it (A-3 to A-4). "Unitization" means the combining of tracts for "the joint operation of all or some part of a producing [oil and/or gas] reservoir. * * * The purpose of unitization is to permit the entire field (or a very substantial portion of it) to be operated as a single entity, without regard to surface boundary lines." 6 Williams and Meyers, *Oil and Gas Law* 2-3 (1977 ed.).

For example, lessees of tracts A and B may agree to unitize their tracts into a single field and share the total production on some agreed formula—in this case, the ratio of each tract's surface area to the total surface area unitized. If gas from tract A is certificated for sale in interstate commerce and tract A is later unitized with tract B, the lessee of A is obligated to deliver to interstate commerce his share of the gas produced from the unitized acreage. See A-36 to A-37, A-54 to A-55, A-75 to A-78. The various unitization disputes in this case are not relevant to the issue presented by the court of appeals' opinion. While the parties before the Commission disagreed with respect to whether certain other acreage was in fact unitized with Butler B (and thus whether gas from the additional acreage was dedicated to interstate commerce (see A-54, A-56; A-70 to A-80)), the court of appeals held that gas from neither Butler B nor any additional acreage was dedicated to interstate commerce because the certificated service had been lawfully abandoned. The only issue presented by the court's opinion is whether the service was lawfully abandoned. See also p. 8, note 5, *infra*.

sell to the du Pont Company, for industrial uses in *intrastate* commerce, all the gas from its interests in both the Butler B and the Butler A leases (A-9 to A-10; App., *infra*, pp. 5a-6a).

National successfully produced gas in 1972 from two wells drilled to its allotted depths on the west 50 acres of the Butler B tract (A-10; App., *infra*, p. 4a). National was in the process of arranging to sell this gas to United, when United, on making a title search, learned of its interest in the Butler B tract under the 1953 contract (A-10 to A-11; App., *infra*, p. 4a). On June 6, 1973, United notified the McCombs Group that it claimed all the gas being produced from the Butler B tract (subject to its unitization with the Butler A tract) by virtue of the 1953 gas purchase contract (A-11; App., *infra*, pp. 5a-6a).

Acting on the ensuing complaint by United, the Commission, after hearing and initial decision by an administrative law judge (A-13 to A-16), held in Opinion No. 740, issued August 20, 1975 (A-1 to A-45), that gas produced from the unitized Butler B acreage was dedicated to interstate commerce and to United. The Commission found that service from the Butler B lease had been commenced as authorized in the certificate, so that the Butler B gas was dedicated to interstate commerce (A-29 to A-36). Although service from the original well on Butler B had ceased by the end of 1966, there had been no abandonment pursuant to Section 7(b), the Commission found. Hence the gas currently flowing from the acreage was required to be delivered to United,

and the sales in intrastate commerce by the present leaseholders were in violation of Section 7(b) (A-29, A-42 to A-43).[5]

On petition for review, a divided court of appeals, acting after rehearing (A-92), set aside the Commission's order (App., *infra*). The court concluded that as a physical fact, abandonment had occurred in 1966 when the production of gas from the original well on the Butler B leasehold ceased (App., *infra*, pp. 11a-15a). The court also relied on the two letters that the Commission's Secretary had written to the leaseholders in 1968 ~~to~~ and 1971 (A-97 to A-98, A-100 to A-101; see p. 5, *supra*). The court quoted excerpts from the opinion it had previously withdrawn (A-93) which stated, for example, that the two letters "must be acknowledged as a recognition by the Commission that there was in fact an abandonment, but

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[5] In Opinion No. 740 and in subsequent opinions on rehearing (Opinion No. 740-A (A-46 to A-69) and Opinion No. 740-B (A-70 to A-80)), the Commission dealt with other issues. These included an alleged settlement between the parties and the question whether the Butler A - Butler B unit had been dissolved by the parties and, if so, whether the Commission would have to approve, under Section 7(b), the attempted dissolution of the unit. The Commission in those opinions also remanded the case for further evidentiary hearings on some of those issues. The court of appeals did not consider any of those issues, since it concluded that the interstate service from both Butler B and Butler A had been lawfully abandoned. The court set aside the Commission's orders and directed that the other pending proceedings based on those orders be dismissed (App., *infra*, p. 15a). In view of the court's opinion, those other issues are not now presented.

there was something needed for the record" (App., *infra*, p. 8a).

The court concluded: "We hold that, as a matter of law, based upon the facts and circumstances of the instant case, there was an abandonment under Section 7(b) of the Natural Gas Act which does not render the issue within the expertise of the Commission. * * * [T]he only known reserves of natural gas for which applications for certification had been made and authorized had been depleted. With its depletion and subsequent five year period of non-service, there was no need for the formality of a Section 7(b) hearing" (App., *infra*, pp. 11a-12a).

Judge Holloway dissented (App., *infra*, pp. 16a-20a).

## REASONS FOR GRANTING THE WRIT

The court of appeals, by holding that it may determine in the first instance to permit an abandonment of certificated natural gas service, where the Commission neither made nor was asked to make the finding required by Section 7(b) of the Natural Gas Act, has disregarded the terms of the Act and intruded on the exclusive responsibility that Congress has given the Commission. The court is wrong in suggesting that the Commission "acknowledged" the fact of abandonment, and wrong in assuming that the Commission would have granted abandonment if an application had been filed. Most important, the decision below should not be allowed to stand because it will undermine the administrative procedure established

by Section 7(b) and the important regulatory purposes that that procedure serves.

1. The holding of the court of appeals is contrary to the terms of the statute. Section 7(b) states that "[n]o natural-gas company shall abandon" a service of supplying natural gas for resale in interstate commerce "without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment" (see p. 3, *supra*).

In this case the permission and approval of the Commission for abandonment of the certificated service from the Butler B tract were not sought, much less "first had and obtained." Nor was there any "finding by the Commission that the available supply of natural gas is depleted * * *." The Commission plainly could not make such a finding, since it is undisputed that, at the time of the proceeding under review, the available supply of Butler B gas was not depleted but was being delivered in intrastate commerce to du Pont (A-10).[6]

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[6] As the Commission found, since the 1953 gas purchase contract covered "merchantable natural gas * * * produced from all wells now or hereafter drilled" on the Butler B leasehold, the original and amended certificates embraced "the merchantable gas produced from any depth * * * drilled through February 7, 1981," and in particular "all of the gas which has been produced from or attributable to the Butler B lease since gas was rediscovered at deeper depths late in 1971" (A-32 to A-

This Court has often recognized that Section 7(b), as it plainly says, requires the approval of the Commission before a certificated service in natural gas may be abandoned. As the Court stated in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 158 n. 25 (emphasis added):

> It might be observed that in these cases the Commission issued certificates without time limitations. *Thus if the companies, failing to find new sources of gas supply, desired to abandon service because of a depletion of supply, they would have to make proof thereof before the Commission, under § 7(b). The Commission thus, even though there may be physical problems beyond its control, kept legal control over the continuation of service by the applicants.*

See also, *e.g.*, *United Gas Pipe Line Co.* v. *Federal Power Commission*, 385 U.S. 83, 89; *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, 389. Most recently, in *California* v. *Southland Royalty Co.*, No. 76-1114, decided May 31, 1978, the Court held (slip op. 7):

> Once the gas commenced to flow into interstate commerce from the facilities used by the lessees, § 7(b) required that the Commission's permission be obtained prior to the discontinuance of "any service rendered by means of such facilities."

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33). Thus, "[t]he initiation of interstate service pursuant to the certificate dedicated all fields subject to that certificate." *California* v. *Southland Royalty Co.*, No. 76-1114, decided May 31, 1978, slip op. 5.

This Court has thus made it clear that under Section 7 the Commission may "control both the terms on which a service is provided to the interstate market and the conditions on which it will cease." *California* v. *Southland Royalty Co.*, *supra*, slip op. 4. This authority is essential if the Commission is to discharge its responsibility of assuring, in accordance with the "fundamental purpose" of the Natural Gas Act, "an adequate and reliable supply of gas at reasonable prices" (*id.* at 3). The court below, in holding that certificated service may be lawfully abandoned without the Commission's approval or even a request for such approval, has disregarded what the Act says.

In addition to the language of Section 7(b), basic principles of administrative law preclude reviewing courts from engaging in fact-finding or other functions that are within "the domain which Congress has set aside exclusively for the administrative agency." *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 196. Indeed, even after reviewing an agency's decision and determining that additional consideration or evidence is necessary, the court may not itself undertake the fact-finding function that Congress has assigned to the agency, or prescribe the details of how the agency should undertake that function. *E.g.*, *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333; *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 21. See Judge Holloway's dissent, App., *infra*, p. 17a.

2. The court of appeals' conclusion that abandonment had occurred "as a matter of law" rested on its view that between 1966 and 1971 all parties, "including the Commission," had "acknowledged" that the known reserves on the Butler B tract were depleted (App., *infra*, p. 12a). The conclusion apparently rested also on the court's view that, on the basis of the facts known at the time, the Commission would have granted an abandonment application had one been filed, so that "there was no need for the formality of a Section 7(b) hearing" (*ibid.*). These conclusions are incorrect. Moreover, they reflect a basic misconception of the administrative procedure established by the Act and the regulatory purposes embodied in that procedure.

First, the Commission never "acknowledged" that the available reserves were depleted. The letters from the Commission's Secretary on which the court relied —though they were not in the record—stated that if further sales were not contemplated, "it will be necessary for you to file an abandonment application * * *" (A-97, A-100). This was an insistence that the statutory procedure be complied with—so that *the Commission* could determine whether the supply of gas had been depleted or whether abandonment was otherwise warranted. It was in no way a waiver of that procedure, or a dismissal of the procedure as a needless "formality."[7]

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[7] Even if the Commission's Secretary had opined on the depletion of reserves or the merits of abandonment, which he

Second, there is no warrant for the court's apparent assumption that the Commission would have granted an abandonment application if one had been filed between 1966 and 1971. Subsequent drilling has demonstrated that there was in fact an abundant reserve of gas underlying the leasehold. To be sure, the one relatively shallow well then producing on the leasehold ceased production in 1966. But this fact does not establish that the Commission, after a Section 7(b) hearing at which all interested parties would have had an opportunity to explore the facts,[8] would have concluded that the reserves under the leasehold were sufficiently depleted to warrant abandonment.[9] It is, indeed, strange for the court to conclude with such certainty that the Commission, if it had been asked

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clearly did not, his opinion would not be binding on the Commission. Under Section 7(b) only the decisions of the Commission itself have legal effect. Thus, it has been held that an interpretation by the Secretary of the Interstate Commerce Commission of the abandonment provisions of the Interstate Commerce Act could not bind that agency (*Thompson* v. *Texas Mexican Railway Co.*, 328 U.S. 134, 146); nor can the views of a single commissioner do so (*Minneapolis & St. Louis R. Co.* v. *Peoria & Pekin Union Ry. Co.*, 270 U.S. 580, 585).

[8] It is noteworthy that the letters from the Commission's Secretary to the lessee-producers, stating that it would be necessary for them to file an application for abandonment if further sales were not contemplated, both required, as part of the filing, "three copies of a statement from the buyer [*i.e.*, the pipeline] indicating its position with respect to the proposed abandonment" (A-97, A-101).

[9] The court noted that at oral argument the Commission's counsel had acknowledged that circumstances such as those

to make the finding that the statute requires, would have found as a fact what is now known to have been false.[10]

3. Even if there were ground for assuming that the Commission would have granted an abandonment application if one had been filed between 1966 and 1971, that assumption would be legally irrelevant under the regulatory scheme of the Act. This is so because Section 7(b) mandates an administrative procedure, and that procedure serves important regulatory interests.

By requiring that abandonment applications actually be filed with the Commission before abandonment may be granted, Section 7(b) assures, first,

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attending the 1966 termination of service to United "have been acceptable evidence of depletion of gas for purposes of abandonment orders under Section 7(b)" (App., *infra*, p. 13a). But since no application for abandonment was filed in 1966, it is idle to speculate about what the factual evidence would actually have been, about whether that evidence would have been rebutted, or otherwise about what the Commission might have done if an application had been filed. The controlling facts are that the original certificated obligation was still in force at the time it became clear that the gas supply underlying Butler B was not depleted.

[10] The Commission has, in fact, recently refused to grant abandonment authority to a producer who failed to show that his leasehold had been explored to an extent sufficient to establish that no additional gas reserves could be expected to be discovered through further exploratory efforts. *Texaco, Inc., et al.*, FERC Docket Nos. G-8820, *et al.*, Order Granting Petition for Reconsideration and Modifying Prior Order issued November 1, 1977, mimeo at 3.

that the Commission and all other interested parties will have an opportunity, in a "due hearing" and in the light of the statutory standard, to examine the facts bearing on the alleged depletion of reserves. Moreover, it assures that they will have that opportunity at the relevant time, not years after the fact. The decision of the court of appeals, on the other hand, to a large extent vests the determination of whether dedicated service has been abandoned in the certificate holders themselves, and empowers the courts retroactively to convert *de facto* termination of service into *de jure* abandonment.[11]

Moreover, the requirement of filing with the Commission promotes certainty and regularity in the regulatory scheme. It makes it possible for producers, pipelines, customers, and prospective assignees of once-dedicated acreage to know whether or not a given tract (and future production from it) remains dedicated to interstate service. Under the court's ruling, in contrast, abandonment may be established not only by an order of the Commission but by "the

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[11] The impact of the court's holding would not be limited to cases where the court would be as confident as it was here that the Commission would have granted abandonment if asked to. Indeed, to the extent that a producer seeking to terminate interstate sales fears that the Commission would not grant his abandonment application, to that extent he has an incentive, under the court's decision, to simply terminate service, avoid facing the Commission, and trust that his *fait accompli* will look inevitable to a court after some years have passed. Under the court's decision producers have more to gain than to lose by failing to comply with the statutory requirement.

fact" of actual or assumed depletion of the dedicated reserves, as that fact may be certified—or not certified—by a court years later. It would often be unclear whether particular facts met the test for the doctrine of "*de facto* abandonment" that the court has here created, and undesirable uncertainty would result.

Finally, Section 7(b) ensures that abandonment questions will be determined in the first instance by a single tribunal applying uniform standards and its own expertise. The court of appeals' ruling—that abandonment can be determined in the first instance by any reviewing court on the basis of its own view of the facts—invites inconsistent decisions and standards by a multiplicity of tribunals, contrary to the basic purpose of the statute. Cf. *United States* v. *Radio Corporation of America*, 358 U.S. 334, 346; *Thompson* v. *Texas Mexican Railway Co.*, 328 U.S. 134.

In short, Section 7(b) gives the Commission primary jurisdiction over the abandonment of certificated service, and that primary jurisdiction is essential to the effective performance of its regulatory responsibility. Thus it is irrelevant whether a court believes that the Commission would or should have exercised its authority in a certain way if it had been given the opportunity to do so. The statute requires that the Commission have the opportunity.[12]

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[12] Although the court of appeals (App., *infra*, p. 14a) relied on language from *Union Oil Co. of California* v. *Federal Power*

4. Because the court of appeals' decision is inconsistent with the plain language of Section 7(b), with this Court's decisions and with well-established principles governing the proper relationship between reviewing courts and regulatory commissions (cf. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, No. 76-419, decided April 3, 1978, slip op. 22), we suggest that it would be appropriate in this case for the Court summarily to reverse the decision of the court of appeals. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp., supra; Federal Power Commission* v. *Idaho Power Co., supra.*

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*Commission*, 542 F.2d 1036 (C.A. 9), we are unable to see how that case has any bearing here. That case involved review of Commission rulemaking, and the court set aside a Commission rule requiring producers to file reports of their gas reserves on the ground that the rule was not supported by substantial evidence. Although the court erroneously applied the substantial evidence test to the review of notice and comment rulemaking (see *Federal Communications Commission* v. *National Citizens Committee for Broadcasting*, No. 76-1471, decided June 12, 1978, slip op. 26), it did not hold or suggest that a court could find abandonment in the first instance or otherwise supplant the Commission's fact-finding responsibilities under the Act.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted and the judgment of the court of appeals should be summarily reversed.

Respectfully submitted.

WADE H. MCCREE, JR.,
*Solicitor General.*

ROBERT R. NORDHAUS,
*General Counsel,*

HOWARD E. SHAPIRO,
*Solicitor,*
*Federal Energy Regulatory Commission.*

AUGUST 1978.

**APPENDIX**

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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No. 75-1829

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[Filed Feb. 9, 1978]

BILLY J. MCCOMBS, R. JAMES STILLINGS, d/b/a GASTILL COMPANY, DAVID A. ONSGARD, BASIN PETROLEUM CORP., E.I. DUPONT DENEMOURS & COMPANY, and BILL FORNEY, PETITIONERS

*vs.*

FEDERAL ENERGY REGULATORY COMMISSION, formerly known as FEDERAL POWER COMMISSION, RESPONDENT

UNITED GAS PIPE LINE COMPANY, INTERVENOR

OPINION ON REHEARING
ON PETITION FOR REVIEW OF ORDERS
OF THE FEDERAL POWER COMMISSION

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Submitted: November 14, 1977

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Before SETH, HOLLOWAY and BARRETT, Circuit Judges.

BARRETT, Circuit Judge.

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These proceedings come before us for rehearing involving a review of opinions rendered by the Federal Power Commission (FPC) finding that the petitioners (McCombs Group) had violated two sections of the Natural Gas Act, 15 U.S.C. §§ 717f(b) and 717f(f) by failing to deliver natural gas to United Gas Pipe Line Company (United) under a producer's certificate authorizing the sale and continued sale of gas in interstate commerce. The pivotal dispute is whether the certificate was in force and effect or whether it had been abandoned prior to these proceedings. The FPC found that there had been no abandonment. In McCombs v. Federal Power Commission, 542 F.2d 1144 (10th Cir. 1976), authored by Judge Seth, the orders of the Commission involved here were set aside. However, this court granted the Commission's petition for rehearing. Thereafter, on October 18, 1977, this court directed and ordered that the opinion and judgment of October 18, 1976, *supra*, be withdrawn and vacated. We will refer to and quote from the prior opinion which has been vacated and withdrawn, however, inasmuch as it is reported in 542 F.2d 1144, *supra*.

In 1953, the leaseholders-producers of the Butler B Lease covering a 163 acre tract situate in Karnes County, Texas, entered into a Gas Purchase Contract with United whereby the producers agreed to sell to United all natural gas produced then or thereafter from the tract. The producers applied to the FPC for producer certificates which were granted on De-

cember 8, 1954, authorizing the sale of the natural gas in interstate commerce.

The Butler B lease was assigned on various occasions prior to June 19, 1963, when the FPC terminated the 1954 certificates and issued a new certificate authorizing one H.A. Pagenkopf, then the Butler B lease assignee, to continue the service. This operator assigned the Butler B lease to one Louis H. Haring (Haring), et al., effective March 1, 1966. Haring appointed Bay Rock Corporation (Bay Rock) to operate the properties. At that time one well only had been completed on Butler B at a depth of 2,900 feet. It was not then producing. Haring-Bay Rock attempted to re-establish production from this well but those efforts failed for the most part and all production from the well and the lease terminated on May 28, 1966.

On December 5, 1966, Haring and Bay Rock informed United that production had ceased, that the gas reserve was depleted from the well and that there was no gas available for sale at that time. No deliveries of gas had been made to United since September 16, 1966. Following the notification that gas from the well was depleted, United wrote Bay Rock that it planned to remove its measuring station which had been used to measure gas delivered to it from the well on the Butler B lease but that if, at some future date, further gas should become available from the properties subject to the 1953 contract, United should be informed so that it could arrange to reinstall the measuring equipment. United then re-

moved the measuring equipment. Haring testified that he then considered the 1953 contract terminated.

Haring thereafter assigned his working interest rights, as successor lessee, to certain sands or reservoirs between depths of 8,700 feet to 9,700 feet. By means of unitization, the McCombs Group (Group) acquired the right to drill into these deeper depths involving the Butler B lease and an adjoining tract known as the Butler A lease, consisting of some 150 acres. Thereafter, the Group drilled and completed four producing gas wells from the deeper depths. One other company, National Exploration Company (National) which had previously acquired the Haring working interests in the west 50 acres of the Butler B lease covering depths of 4,115 feet to 8,700 feet had completed two producing gas wells. United contacted National in April of 1972 relative to purchasing the gas from these two wells. National then first became aware, in examining title documents in anticipation of sale of the gas, of United's 1953 purchase contract. National informed United that the gas from its two wells may be subject to United's 1953 Gas Purchase Contract. It was then that United undertook a title search concerning the Butler B tract. In May, 1973, United learned of its interest under the 1953 contract.

Haring did not at any time inform the Group of United's 1953 Gas Purchase Contract. He considered that contract terminated when production ceased from the single producing well on May 26, 1966.

When he transferred his working interest rights to the deeper horizons in the Butler B lease to the Group, Haring did not believe that United had any further right or claim to gas which may be thereafter produced from the lease. The Group, before drilling, relied upon a 1967 title opinion which did not reflect any interest which United might have in the Butler B tract. After the Group realized production from its first well drilled on the Butler A tract in 1971, it contacted United, together with other prospective gas purchasers, relative to negotiations for sale of the gas. United wrote the Group on November 19, 1971, inquiring with regard to how the Group had acquired its interests in the leases. There is nothing in the record which casts any light on the negotiations. However, the Group did obtain a new title opinion on December 7, 1971, which for the first time disclosed to the Group United's 1953 Purchase Contract relating to the Butler B lease. Thereafter, in February, 1972, the Group discovered commercial gas from another well drilled on the Butler A tract. A title opinion of May 31, 1972, did not disclose any interest of United therein. In June of 1972, the Group concluded successful negotiations whereby it agreed to sell all of the gas it purchased from the Butler A and B leases to E.I. duPont deNemours & Company for industrial uses in *intrastate* commerce.

The Group successfully completed two more gas wells on the unitized tracts. Thereafter, on June 6, 1973, United notified the Group that it claimed all

of the gas being produced from these tracts under and by virtue of its 1953 Gas Purchase Contract. The Group thereupon initiated a declaratory judgment action in the district court of Karnes County, Texas, against United. The action was removed to federal district court. On October 9, 1973, United filed a complaint with the FPC. Our reported opinion in McCombs v. Federal Power Commission, *supra*, detailed those proceedings leading to the Commission's adoption of the administrative law judge's conclusion that "the service authorized and the gas supply dedicated [under the original certificate involved here] include any and all gas produced from the Butler B acreage "and that, consequently, the intrastate sale to duPont was violative of the Natural Gas Act. The administrative law judge further found that however negligent United may have been in asserting its rights under the 1953 Gas Purchase Contract and however innocent the Group may have been, that, notwithstanding, the Group should be ordered to cease and desist from continuing sales to duPont.

The basic matter for our determination on this rehearing relates to the issue of abandonment. The Commission held that there can be no abandonment of a certificate authorizing interstate service absent strict compliance with the requirements of petition, notice, hearing and establishment of cause for abandonment as required under 15 U.S.C.A. § 717(b) and § 717f(b).

Additional facts relating to the matter of abandonment set forth in our reported opinion in McCombs v. Federal Power Commission, *supra*, are appropriate here:

> To consider again some of the facts outlined above as they relate to this issue, the one producing gas well on the Butler B lease ceased producing early in 1966. The lease was assigned by Pagenkopf effective in March 1966, and the assignee, Haring, attempted to work over the well. During this work, about 3,000 Mcf was produced, but all production again ended in May 1966. The operator for Haring advised the gas purchaser, United, in December 1966 that the well was depleted. United thereafter in 1966 removed the equipment it had connected to the well. Thus, the only producing gas well was abandoned in the fall of 1966. The operator and the purchaser recognized that there could be no more gas delivered from the well. This was a physical fact beyond the control of either of them, and they recognized the realities of the situation. The operator or owner had tried to restore production but was unable to do so. The sellers and buyers wished to continue the sale and purchase of gas but could not do so. The record does not show that any gas was ever produced thereafter from this original well. The witness Haring who was the owner who attempted the workover, and who was a petroleum geologist, testified:
>
> "Certainly I was not aware of the gas reserves at deeper levels when the gas pro-

> duction ceased in 1966, and, as far as I know, neither United nor anyone else was aware of its existence."

In August 1968, the FPC wrote a letter to Pagenkopf suggesting that he file an application for abandonment. By an undated letter the Commission made a similar suggestion to the operator for Pagenkopf's successor, Haring. The FPC thus twice recognized that there had been no production for an extended time, and recognized that the abandonment should be formalized for its records. This must be acknowledged as a recognition by the Commission that there was in fact an abandonment, but there was something needed for the record. The records of the FPC as to this matter have apparently been destroyed under its procedures; consequently, it is not known what they may have indicated as to abandonment. The Commission in Opinion No. 740 in footnote 2 states as to the original proceedings for certification: "Our records indicate that Docket Nos. G-2997 and G-2998 were destroyed in 1964." It is apparent however from the testimony that no operator or owner filed a formal application to abandon.

542 F.2d, at p. 1148.

In that same opinion we further observed and held:

> Thus we have a situation where there was an abandonment as a recognition of the indisputable physical facts beyond anyone's control. The Commission participated in this recognition as there were at least two suggestions by the

Commission that someone file something to tidy up the records. These letters from the Commission must be taken, in view of the destruction of the supporting records, to be an acknowledgment that there was an abandonment. It is difficult to see how a formal application, and a decision by the Commission could have added anything to these letters. In these circumstances, we must hold that there was an abandonment which was recognized by the Commission, and its jurisdiction ended.

Thus we must hold as a matter of law that there was an abandonment sufficient under Section 7(b) of the Natural Gas Act. This being a matter of law, we do not consider it within the expertise of the Commission.

The "abandonment" we refer to is that contemplated under Section 7(b) of the Act, as above indicated. This is the only "abandonment" which is applicable to these circumstances. Section 7(b) refers to "service rendered," and the ordering of further "service" would have been a futile gesture. The seeking of an application by the Commission was a recognition of the fact that no more gas could be delivered from the only gas well, and that the "service rendered" had long since ceased contrary to everyone's wishes. This action by the Commission thus could only have reference to Section 7(b).

542 F.2d, at pp. 1148, 1149.

We know of no opinion dealing with a factual situation similar to that presented here. In light of the facts and circumstances contained and reflected in

this record, we hold that the Commission erred in concluding that the cessation of gas production from the Butler B leasehold on May 28, 1966, did not constitute an abandonment under Section 7(b) of the Natural Gas Act.

I.

FPC contends that § 7(b) of the Natural Gas Act [15 U.S.C.A. § 717f(b)] is explicit in requiring that prior Commission approval must be obtained by any natural gas company before it can abandon any "facilities," or "service" involving the transportation and resale of gas dedicated by certificate to sale in interstate commerce. The full text of § 7(b) is as follows:

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that present or future public convenience or necessity permit such abandonment.

To be sure, just as we previously recognized in McCombs v. Federal Power Commission, *supra*, the decisions are abundant and clear on the point that in those cases where the supply of natural gas is not depleted, the service must be continued via the facilities authorized. Obviously, there could be no find-

ing by the Commission that the available supply of natural gas has been depleted under such circumstances. United Gas Pipe Line v. Federal Power Commission, 385 U.S. 83 (1966); Sunray Mid-Continent Oil Co. v. Federal Power Commission, 364 U.S. 137 (1960); Sun Oil Co. v. Federal Power Commission, 364 U.S. 170 (1960); Atlantic Refining Co. v. Public Service Commission of New York, 360 U.S. 378 (1959); Phillips Petroleum Co. v. Federal Power Commission, 556 F.2d 466 (10th Cir. 1977); Farmland Industries, Inc. v. Kansas-Nebraska Natural Gas Co., 486 F.2d 315 (8th Cir. 1973); Valley Gas Co. v. Federal Power Commission, 487 F.2d 1182 (D.C. Cir. 1973); J. M. Huber Corp. v. Federal Power Commission, 236 F.2d 550 (3rd Cir. 1956); Panhandle Eastern Pipe Line Co. v. Michigan Consolidated Oil Co., 177 F.2d 942 (6th Cir. 1949). These decisions support the proposition advanced by this court in Harper Oil Co. v. Federal Power Commission, 284 F.2d 137 (10th Cir. 1960):

> It would thus seem clear that once an independent producer of gas has dedicated his production to interstate commerce and thereby has come under the jurisdiction of the Commission, he remains thereunder so long as production continues. [Citing to Sun Oil Co. v. F.P.C., 364 U.S. 170.]
>
> 284 F.2d, at p. 139.

We hold that, as a matter of law, based upon the facts and circumstances of the instant case, there was an abandonment under Section 7(b) of the Natural

Gas Act which does not render the issue within the expertise of the Commission. Abandonment in the context of the facts and circumstances of this case cannot be equated with a voluntary "giving up" of valuable rights and/or property in the usual sense of relinquishment or surrender. Rather, the abandonment here presents the very practical recognition that there was no *service* to be rendered following the depletion of gas on December 5, 1966, from the Butler B leasehold. All parties recognized that for a period of five years thereafter no *service* could be rendered because the known gas reserves were depleted. These *facts* were acknowledged by all of the parties, including the Commission. Thus, the only known reserves of natural gas for which applications for certification had been made and authorized had been depleted. With its depletion and the subsequent five year period of non-service, there was no need for the formality of a Section 7(b) hearing. This is so because, in our view, all parties, including the Commission, considered that there were no gas reserves available following cessation of production and the subsequent efforts to restore production by workover methods in order to *service* the public consumer, and, of course, to profit from the discovery and sale.

At oral argument, the FPC contended that the certificate originally granted authorized and dedicated all gas without regard to depth or sand/reservoir limitations, to sale in interstate commerce and that there cannot be an "abandonment in fact." The FPC further argued that its expertise is required as

a prerequisite to any abandonment in that a formal hearing may or might see the presentation of expert evidence by the Commission that further reserves of natural gas are likely to exist at other depths, zones, reservoirs, etc., underlying the subject leasehold. Nevertheless, counsel for the Commission did acknowledge that in factual instances such as those presented here, proof of depletion and efforts to resurrect production by workover attempts have been acceptable evidence of depletion of gas for purposes of abandonment orders under Section 7(b).

The Commission urges that Mitchell Energy Corp. v. Federal Power Commission, 533 F.2d 258 (5th Cir. 1976) controls. That opinion held that although the 1949 contract between the gas producer and gas purchaser which dedicated all gas from the seller's interest in leaseholds and units in a particular field had expired in 1973, that nevertheless the successor in interest to the original producer was bound to dedicate the gas to interstate commerce because the successor assumed, as a matter of law, the original producer's obligations. That simply is not the case before us here. There had been no cessation of production in *Mitchell* and certainly no *depletion* of known reserves. *Mitchell* is not at variance with those decisions we have heretofore cited for the proposition that once natural gas is dedicated to interstate commerce it cannot be withdrawn from service in interstate movement without prior Section 7(b) FPC approval.

Our holding that strict compliance with the non-abandonment language of 15 U.S.C.A. § 717f(b), *supra*, does not control under the facts and circumstances here is, we believe, buttressed by certain language contained in Union Oil Co. of California v. Federal Power Commission, 542 F.2d 1036 (9th Cir. 1976). At issue there was the FPC requirement that all producers of natural gas dedicated to interstate commerce annually submit a Form 40 containing detailed information about their natural gas reserves. The Court rejected the FPC contention that the reporting burden on the producers was outweighed by the Commission's need to have the reservoir data. The Court stated, in pertinent part:

> There is no evidence from which the FPC could conclude that the data required on Form 40 on a by reservoir basis were or could easily become available. The only evidence is to the contrary . . . Although there was no evidence before the Commission to contradict the unanimous statements of the producers that natural gas reserve data are not kept by them on a 'by reservoir' basis and that such data would be extraordinarily expensive to obtain, the Commission majority found that '[T]here is little doubt that the information required . . . is possessed by the respondents.' . . . This assertion is simply wrong . . . The Commission's factual determination that the data required are available is not supported by any evidence, much less by substantial evidence.
>
> 542 F.2d, at p. 1042.

We conclude that the abandonment of the service in the instant case was accomplished, as a matter of law, when all of the parties recognized that the then known natural gas reserves were depleted in 1966 followed by failure to provide any service under the certificates for a period of five years during which time there was no evidence of other estimated gas reserves recoverable from the subject leaseholds.

We direct that all orders included in the Commission's Opinions Nos. 740, 740-A, and 740-B be set aside. We remand with directions that other pending proceedings in the Commission's Docket No. CP74-94 based on such orders be terminated and that the proceedings be dismissed.

IT IS SO ORDERED.

HOLLOWAY, Circuit Judge, dissenting:

I respectfully dissent. While the equities favor the McCombs Group, du Pont and National, usual contract rules and equitable considerations do not control in this proceeding under the Natural Gas Act, in my opinion. Instead, there are mandatory statutory requirements on abandonment of service which were imposed to protect the public interests recognized by the Act, Sunray Oil Co. v. FPC, 364 U.S. 137, 143, and these provisions convince me that we should affirm the basic holding of the Commission in this case.[1]

The majority opinion reasons (p. 8) that: there was an abandonment in fact after all production ceased in 1966 on the Butler B lease from then known productive formations, as recognized by the Commission and the parties; that with this recognized abandonment the Commission's jurisdiction ended; and that this abandonment was sufficient, as a matter of law, under § 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b), and this being a matter of law, it was not within the expertise of the Commission.

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[1] The majority opinion does not reach other issues raised such as the propriety of the ruling on dissolution of the units, of the order requiring repayment to United of quantities of gas sold to du Pont in the intrastate transaction, and the failure to sustain the motion challenging jurisdiction as to du Pont. Thus it is unnecessary for me to address these issues. I will consider only the holding of the majority on the central abandonment issue.

To me these conclusions are directly contrary to the plain terms of § 7(b). The statute could hardly be clearer in saying that:

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, *without the permission and approval of the Commission first had and obtained*, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. (Emphasis added).

It is the *Commission* that must make the required findings and give approval before abandonment is legally effected, and not private parties by their agreement on the facts as to depletion and their consent to discontinuation of service. Nor does a determination by another tribunal that abandonment has occurred, as a matter of law, satisfy § 7(b). As the Supreme Court pointed out in *Sunray, supra,* 364 U.S. at 158 n. 25:

> [25] It might be observed that in these cases the Commission issued certificates without time limitations. *Thus if the companies, failing to find new sources of gas supply, desired to abandon service because of a depletion of supply, they would have to make proof thereof before the Commission, under § 7(b).* The Commission thus, even though there may be physical prob-

> lems beyond its control, kept legal control over the continuation of service by the applicants. (Emphasis added).

See also Atlantic Refining Co. v. Public Service Commission, 360 U.S. 378, 389; Phillips Petroleum Co. v. FPC, 556 F.2d 466, 469 (10th Cir.); Mitchell Energy Corp. v. FPC, 533 F.2d 258, 261 (5th Cir.).

The majority lays stress on the fact that production from the known reserves underlying the Butler B lease was depleted in 1966, that there was testimony that neither United, the producer, nor anyone else was then aware of deeper reserves, and that as a practical matter there was no service that could be rendered thereafter from that lease. And, as the majority says, counsel for the Commission conceded that proof of such depletion and of failure of efforts to re-establish production has been accepted by the Commission in § 7(b) proceedings as a basis for permission for abandonment. Further the Commission did twice write suggesting that an application for abandonment be filed, which action the majority interprets as Commission recognition that there was in fact an abandonment.

However, there were other reserves as is now known, and United did state that while it would remove its metering equipment in 1966, it would reinstall such equipment whenever further gas might be delivered under the contract. (J.A. 137). In view of these circumstances it may not be quite certain what would have happened if application for a complete abandonment had been made, notice thereof had been

given by publication,[2] and a final abandonment approval had been considered by the Commission. But, in any event, permission for abandonment of all service was for the Commission and we cannot make the findings and give the approval which Congress deemed it necessary for the Commission to make. *Sunray, supra*, 364 U.S. at 142.

The Commission noted in its Opinion 740 that the original 1953 contract covered merchantable natural gas produced from all wells now or hereafter drilled during the 10-year term of that contract (later extended to 1981) on specified leaseholds including the Butler B tract, and further noted that there was no mention of any particular depths in that contract. (J.A. 160-61). Further, the McCombs Group now does not contest the fact of delivery of gas from the Butler B lease to United.[3] Such delivery constituted

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[2] The Commission's regulations required notice by publication and mailing to States affected by the application, see 18 CFR § 157.9 (January 1, 1969), and permitted petitions for interventions by persons desiring to participate. See 18 CFR § 157.10 (January 1, 1969). Pipeline purchasers have been permitted to intervene in such proceedings. See, *e.g.*, Transcontinental Gas Pipe Line Corp. v. FPC, 488 F.2d 1325, 1326-27 (D.C. Cir.), cert. denied sub nom. Natural Gas Pipeline Co. v. Transcontinental Pipe Line Corp., 417 U.S. 921.

[3] The McCombs Group says that the statement by United indicating that the record shows that gas was received by United from the Butler B lease should be read with some caution. The McCombs Group points to the absence of evidence in the original record that gas was actually delivered from the Butler B lease to United, but recognizes that United later presented some evidence on the point in subsequent proceedings before the Commission. The McCombs Group states that

both a sale under the contract and commencement of a "service" obligation in interstate commerce under the Act. Phillips Petroleum Co. v. FPC, supra, 556 F.2d at 469. As this delivery was made under a contractural dedication without limits as to depths, there was a dedication to interstate commerce of the underlying reserves in question, and the effort to resell the same gas amounted to an attempted abandonment, which could not be done without first obtaining approval of the Commission under § 7(b). Ibid.

For these reasons I would sustain the Commission's conclusion that the commencement of service completed dedication to United in interstate commerce and thereby invoked the protection of § 7(b). (J.A. 163). And concluding that procedures made mandatory by the Act have not been complied with, I must dissent.

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since it is not seeking merely a remand, it has not raised the delivery of Butler B gas to United as an issue in this review proceeding, except as evidence of the Commission's partiality toward United. (Reply Brief of McCombs Group, 2).

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Nos. 78-249 and 78-17

# In the Supreme Court of the United States

OCTOBER TERM, 1978

FEDERAL ENERGY REGULATORY COMMISSION,
PETITIONER

*v.*

BILLY J. MCCOMBS, ET AL.

UNITED GAS PIPE LINE COMPANY, PETITIONER

*v.*

BILLY J. MCCOMBS, ET AL.

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

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# In the Supreme Court of the United States

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## BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

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## OPINIONS BELOW

The opinion of the court of appeals (A. 23A-37A)[1] is reported at 570 F.2d 1376.[2] Opinion Nos. 740 (Pet. App. A-1 to A-45) and 740-A (Pet. App. A-46 to A-69) of the Federal Power Commission are reported at 54 F.P.C. 755 and 2034. Opinion No. 740-B (Pet. App. A-70 to A-80) is not yet reported.

## JURISDICTION

The court of appeals entered its judgment on February 9, 1978 (Pet. App. A-94) and denied rehearing as of April 4, 1978 (Pet. App. A-95 to A-96). United Gas Pipe Line Company filed a petition for a writ of certiorari in No. 78-17 on July 3, 1978, and the Federal Energy Regulatory Commission[3] filed a petition in No. 78-249 on August 14, 1978, within the time extended by order of Mr. Justice White. The petitions were granted on October 10, 1978, and the cases were consolidated (A. 39A-40A). The Court's

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[1] "A." refers to the Appendix (tan cover) to the briefs in this Court. "Pet. App." refers to the separately bound Appendix (white cover) to the petition for certiorari in No. 78-17 (see 78-249 Pet. 1 n.1).

[2] An earlier opinion of the court of appeals (Pet. App. A-81 to A-91), subsequently vacated and withdrawn (Pet. App. A-93), is reported at 542 F.2d 1144.

[3] Pursuant to the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565, the functions of the Federal Power Commission relevant to this case were transferred to the Federal Energy Regulatory Commission, effective October 1, 1977. We use the term "the Commission" to refer to either body, as the temporal context indicates.

jurisdiction rests on 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

## QUESTION PRESENTED

Whether a court of appeals, reviewing a Commission determination that gas currently flowing from a tract is dedicated to interstate commerce, may independently determine that the certificated service was abandoned under Section 7(b) of the Natural Gas Act because production from the tract had ceased between 1966 and 1971, even though the Commission's approval for abandonment was never obtained and was not sought at the time the production had ceased.

## STATUTE INVOLVED

Section 7(b) of the Natural Gas Act, 15 U.S.C. 717f(b), provides:

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

## STATEMENT

Respondents "the McCombs group" are producing gas from a leasehold in Texas and selling it in intrastate commerce to a facility of respondent du Pont.[4] The Federal Power Commission held that McCombs had violated the Natural Gas Act, 15 U.S.C. 717 *et seq.*, by failing to deliver that gas to United Gas Pipe Line Company ("United") for resale in interstate commerce, because the gas had been dedicated to interstate commerce under certificates of public convenience and necessity issued to McCombs' predecessors. The court of appeals reversed. It held that there had been a de facto abandonment sufficient to extinguish the service obligation imposed by the Act because production of gas from the leasehold had ceased from 1966 to 1971, even though the Commission had never approved abandonment under Section 7(b) of the Act, 15 U.S.C. 717f(b), and had never been asked to approve it at the time when production had ceased.

### 1. The Facts

In 1948, B.C. Butler, Sr., as lessor, and W.R. Quin, as lessee, executed an oil and gas lease covering a 163-acre tract in Karnes County, Texas, known as the Butler B tract. In 1953, Quin's widow, Bee Quin,

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[4] Respondents Billy J. McCombs, R. James Stillings d/b/a Gastill Company, David A. Onsgard, Basin Petroleum Corporation, and Louis H. Haring, Jr., are collectively referred to herein as "the McCombs group" or "McCombs." Respondent E.I. du Pont de Nemours & Company is referred to as "du Pont."

entered into a ten-year gas purchase contract with United by which she agreed to sell, and United agreed to buy, "merchantable natural gas * * * produced from all wells now or hereafter drilled during the term of this contract on the lands and leaseholds" covered by the contract, including the Butler B tract (A. 7A). The following year, after this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), Mrs. Quin applied for and received from the Commission certificates of public convenience and necessity authorizing the sale of the gas covered by the contract in interstate commerce to United. The certificate contained no time limitation (Pet. App. A-32 to A-33), and there was no provision in the lease, the contract, or the certificate limiting the depth of origin of the gas to be delivered from the Butler B tract (Pet. App. A-32 to A-33; A. 13A-14A).

One well, the Butler No. 7 gas well, was completed on the Butler B tract at a depth of 2,960 feet, and gas from the well was delivered to United through gathering facilities and metering equipment installed by United for that purpose (Pet. App. A-6; A. 8A). After deliveries commenced, the Butler B lease was assigned several times. One assignee, Pagenkopf, applied for and received from the Commission in 1963 a certificate authorizing and requiring the continuation of service to United from the Butler B tract (A. 8A). Pagenkopf and United also amended the 1953 contract to extend its terms through February 1981 (A. 6A; Pet. App. A-32 to A-33).

In March 1966, Pagenkopf assigned the Butler B lease to a group headed by L.H. Haring. Although Haring informed United that he would make the appropriate filings with the Commission to reflect the change in ownership, no such filings were made (A. 8A). When the lease was assigned to Haring, the Butler No. 7 well had stopped producing (Pet. App. A-6). Haring's operator, Bay Rock Corporation, installed a compressor and reworked the well, thereby obtaining about 3,000,000 cubic feet of gas before the well stopped producing again on May 28, 1966 (*ibid.*).

In December 1966, in response to an inquiry from United, Bay Rock notified United that gas on the Butler B lease was depleted and that "there will be no other gas available at this time" (Pet. App. A-7). United replied that it would remove its metering equipment for use elsewhere, but that it would reinstall the equipment "if, at some future date, you have further gas to deliver to us at the above delivery point, which will be subject to the terms of the above-captioned contract" (A. 8A-9A). Neither Haring nor Bay Rock sought or obtained the Commission's authorization for abandonment of the certificated service to United (*id.* at 9A; Pet. App. A-7).

In August 1968, the Secretary of the Commission wrote to Pagenkopf, noting that Pagenkopf's annual report for 1967 indicated no sales of gas to United under the 1953 contract (Pet. App. A-97 to A-98). If no further sales were contemplated, the Secretary advised, "it will be necessary for you to file an aban-

donment application and a notice of cancellation of rate schedule" (Pet. App. A-97). Any such filing should include copies of an agreement with United to cancel the gas purchase contract or, if there was no such agreement, "a statement from [United] indicating its position with respect to the proposed abandonment" (*ibid.*). In January 1971 the Secretary wrote a similar letter to Bay Rock (Pet. App. A-100 to A-101), advising Bay Rock that if no further sales of gas were contemplated under the 1953 contract, "it will be necessary for you to file an * * * application to abandon the service authorized * * *" (Pet. App. A-100).[5] Still, no abandonment application was filed (Pet. App. A-88).

In 1971 and 1972, Haring divided the Butler B leasehold horizontally and vertically. Haring assigned a 75% working interest in the western 50 acres of Butler B, from the depth of 4,115 feet to 8,700 feet, to the National Exploration Company ("National") (Pet. App. A-7 to A-8). And Haring assigned a 72% working interest in the eastern 113 acres of the Butler B tract, from 6,500 feet to 8,653 feet, to the McCombs group, which unitized that interest with its interest at the same depths of the adjoining "Butler A" tract (Pet. App. A-8).[6]

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[5] These letters were not in the record before the Commission. They were, however, considered by the court below (A. 28A-29A).

[6] The Butler B lease authorized the unitization of the leasehold or any part of it (Pet. App. A-3 to A-4). Unitization means the combining of tracts for "the joint operation of all

Drilling to these deeper horizons, the new working-interest owners discovered gas. In 1971 and 1972 the McCombs group drilled four productive wells on its unitized acreage, one of which was on Butler B (Pet. App. A-9 to A-10). On June 1, 1972, the McCombs group contracted to sell all its production from the Butler A and B tracts to du Pont, for industrial uses in intrastate commerce (Pet. App. A-10).

National, in the meantime, successfully produced gas from its two wells on the west 50 acres of the Butler B tract (Pet. App. A-10). National was ar-

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or some part of a producing reservoir. * * * The purpose of unitization is to permit the entire field (or a very substantial portion of it) to be operated as a single entity, without regard to surface boundary lines." 6 H. Williams & C. Meyers, *Oil & Gas Law* 2-3 (1977 ed.).

For example, lessees of tracts A and B may agree to unitize their tracts into a single field and share the total production on some agreed formula—in this case, the ratio of each tract's surface to the total surface area unitized. If gas from tract A is certificated for sale in interstate commerce and tract A is later unitized with tract B, the lessee of A is obligated to deliver to interstate commerce his share of the gas produced from the unitized acreage. See Pet. App. A-36 to A-37, A-54 to A-55, A-75 to A-78. The various unitization disputes in this case are not relevant to the issue presented by the court of appeals' opinion. While the parties before the Commission disagreed with respect to whether certain other acreage was unitized with Butler B (and thus whether gas from the additional acreage was dedicated to interstate commerce (see Pet. App. A-54, A-56, A-70 to A-80)), the court of appeals held that gas from neither Butler B nor any additional acreage was dedicated to interstate commerce because the certificated service had been lawfully abandoned. The only issue presented by the court's opinion is whether the service was lawfully abandoned. See also page 11, note 8, *infra*.

ranging to sell this gas to United when United, on making a title search, learned of its interest in the Butler B tract under the 1953 contract (Pet. App. A-10 to A-11). In June 1973, United notified the McCombs group that it claimed all gas being produced from the Butler B tract (Pet. App. A-11). The McCombs group refused to deliver this gas to United, and United filed a complaint with the Commission (*ibid.*).

**2. The Commission Proceeding**

After a hearing and an initial decision by an administrative law judge (A. 3A-20A), the Commission held in Opinion No. 740 that gas produced from the unitized Butler B acreage was dedicated to interstate commerce and to United. The Commission determined that the certificates issued to the McCombs group's predecessors embraced all sales of natural gas from the Butler B lease (Pet. App. A-32). It based this conclusion on the facts that the certificates authorized sales pursuant to the 1953 contract, and the contract obligated the Butler B lessee to sell to United "merchantable natural gas * * * produced from all wells now or hereafter drilled during the term of this contract" on Butler B and other specified leaseholds, as well as "[s]eller's proportionate part of all merchantable natural gas produced from any well or wells located on any unit or units which include any part of said lands or leaseholds * * *" (Pet. App. A-32).

The Commission noted that Pagenkopf, who assigned the Butler B lease to Haring, had amended the 1953

contract to extend its term to February 1981, and the Commission therefore concluded that Pagenkopf's certificate "covers the merchantable natural gas produced from any depth and from all wells drilled through February 7, 1981, on the leaseholds subject to the 1953 Gas Purchase Contract * * *. Of critical importance to this proceeding, [the certificate] covers all of the gas which has been produced from or attributable to the Butler B lease since gas was rediscovered at deeper depths late in 1971" (Pet. App. A-32 to A-33).[7]

Finding that deliveries to United under the 1953 contract and the certificates had been commenced, the Commission concluded that gas subsequently produced from the leasehold was dedicated to United, and that deliveries of such gas to United could not be terminated without the Commission's approval under Section 7(b) of the Act (Pet. App. A-35 to A-36). The Commission noted that it had not authorized abandonment of the service and determined that there was no basis for granting abandonment under Section 7(b), stating (Pet. App. A-31 n.25):

> Whatever action the Commission may have taken under that provision from the time production ceased in 1966 until it was resumed in 1971, it cannot consider abandonment or abandonment

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[7] Whether gas produced from wells drilled on Butler B after February 7, 1981, would be dedicated by the certificates is a question the Commission did not decide (see Pet. App. A-33 & n.28). It is not presented in this case.

*nunc pro tunc* where the supply of natural gas is not depleted.

Accordingly, the Commission ordered the McCombs group and National to sell and deliver to United the gas attributable to their interests in the Butler B lease (Pet. App. A-42).[8]

### 3. The Court of Appeals Decision

On petition for review, a divided court of appeals, acting after rehearing,[9] set aside the Commission's orders (A. 23A-37A). The court found the "pivotal dispute [to be] whether the certificate was in force and effect or whether it had been abandoned" prior to

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[8] In Opinion No. 740 and in subsequent opinions on rehearing (Opinion No. 740-A (Pet. App. A-46 to A-69) and Opinion No. 740-B (Pet. App. A-70 to A-80)), the Commission dealt with other issues. These included the terms on which respondents would sell and United would buy the gas (which the Commission held would be subject to negotiation by the parties within certain limits (Pet. App. A-39 to A-40)); an alleged settlement between the parties (Pet. App. A-47 to A-51, A-78); and the question whether the Butler A-Butler B unit had been dissolved by the parties and, if so, whether the Commission would have to approve the attempted dissolution under Section 7(b) (Pet. App. A-51 to A-56, A-70 to A-78). The Commission remanded the case for further evidentiary hearings on some of these issues. The court of appeals set aside the Commission's orders and directed that the pending proceedings based on those orders be dismissed (Pet. App. A-91). In view of the court's ruling, these other issues considered by the Commission are not now presented.

[9] The court of appeals withdrew and vacated its earlier opinion and order shortly before the oral argument on rehearing (Pet. App. A-93).

the McCombs groups' production of gas on the Butler B tract (*id.* at 23A). The court did not question the Commission's determination that the gas underlying Butler B had been dedicated to interstate commerce by the Commission's certificates and the commencement of deliveries to United, but held that the service of supplying that gas to United had been abandoned under Section 7(b) as a matter of law, because production from the original well had ceased in 1966 and there was no further production for five years (*id.* at 31A). The court also found that the letters from the Commission's Secretary to Pagenkopf and Bay Rock in 1968 and 1971 constituted "a recognition by the Commission that there was in fact an abandonment, but there was something needed for the record" (*id.* at 28A; see also *id.* at 31A).

The court concluded: "We hold that, as a matter of law, based upon the facts and circumstances of the instant case, there was an abandonment under Section 7(b) of the Natural Gas Act which does not render the issue within the expertise of the Commission. * * * [T]he only known reserves of natural gas for which applications for certification had been made and authorized had been depleted. With its depletion and the subsequent five-year period of non-service, there was no need for the formality of a Section 7(b) hearing" (*id.* at 31A).

Judge Holloway dissented (A. 34A-37A). In his view the majority's holding was "directly contrary to the plain terms of § 7(b)" (*id.* at 34A) and inconsistent with the policies that Section was designed

to serve. Judge Holloway approved the Commission's conclusion that production from the Butler B tract was dedicated to interstate commerce without regard to the depths from which the gas was produced (*id.* at 37A). That being so, "permission for abandonment of all service was for the Commission and we cannot make the findings and give the approval which Congress deemed it necessary for the Commission to make" (*id.* at 36A-37A).

#### 4. The Natural Gas Policy Act of 1978

On November 9, 1978, the Natural Gas Policy Act of 1978 ("NGPA"), Pub. L. No. 95-621, was signed into law. 92 Stat. 3350.[10] Three principal features of that Act should be noted:

1. Under Sections 101-110 of the NGPA, all sales of natural gas after December 1, 1978, are subject to rate ceilings established by the Act. The NPGA establishes different ceiling prices for different categories of gas; the ceiling prices apply to all wellhead sales of gas after December 1, 1978, whether in interstate or intrastate commerce, including sales made under existing interstate or intrastate contracts. Sections 105 and 106(b).[11]

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[10] Copies of the NGPA and of the Conference Report, H.R. Rep. No. 95-1752, 95th Cong., 2d Sess. (Oct. 10, 1978), have been lodged with the Clerk of the Court together with our brief in Nos. 77-1652 and 77-1654, *FERC* v. *Shell Oil Co.*

[11] In the main, ceiling rates for sales of gas already dedicated to interstate commerce will be based on the Commission's established ceiling rate in effect on April 20, 1977, ad-

2. The NGPA expressly codifies the concept, established by decisions under the Natural Gas Act, of natural gas that is "committed or dedicated" to interstate commerce. It provides that future sales of gas so dedicated before November 8, 1978 (with the exception of certain categories)[12] will remain subject to the requirements of the Natural Gas Act and to the Commission's non-rate regulating jurisdiction under the Natural Gas Act. Sections 2(18), 104, 106(a), 601(a). Future sales of gas from reserves so dedicated will therefore remain subject to the conditions of certificates previously issued under Section 7(e), and to the requirement of Section 7(b) that the serv-

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justed upward for inflation. Section 104(b). The Commission retains authority, however, to prescribe higher ceilings for such gas if it finds that the higher ceiling would be "just and reasonable" under the Natural Gas Act. Section 104(b)(2). "New natural gas" (defined in Section 102(c)) will be subject to a ceiling rate of $1.75 per million Btu's, adjusted upward for inflation from April 1977. Section 102(b). Gas sold under existing intrastate contracts will be subject to the ceiling rate for new gas or the rate specified in the contract, whichever is lower. Section 105(b). The foregoing provisions are subject to certain other exceptions and qualifications, and ceiling rates for other categories of gas are also specified. The Act also provides for eventual deregulation, after January 1, 1985, of rates for certain categories of gas. Section 121.

[12] Sections 2(18) and 601 of the NGPA exclude certain categories of previously dedicated gas from the Commission's jurisdiction under the Natural Gas Act; among these categories are "high cost gas," defined in Section 107(c); "new natural gas," defined in Section 102(c); natural gas produced from any "new, onshore production well," defined in Section 103(c); and gas sold under Section 6 of the Emergency Gas Act of 1977, Pub. L. No. 95-2, 91 Stat. 4.

ice of supplying gas from such dedicated reserves may not be abandoned without the Commission's approval.

3. Future sales of gas from reserves that were not dedicated to interstate commerce before November 8, 1978, will not be subject to the requirements of the Natural Gas Act. Section 601(a). Thus, sales of such gas will not require a certificate from the Commission under Section 7 and will not be subject to the abandonment provision of Section 7(b).

The issue in this case is whether abandonment of the service of supplying gas that was dedicated to interstate commerce under the Natural Gas Act may be accomplished without the approval of the Commission under Section 7(b) of that Act, or whether the Commission exceeded its authority by declining to give such approval retroactively in this case. The NGPA does not affect that issue with respect to the gas involved in this case—the gas underlying the Butler B leasehold—since that gas was dedicated to interstate commerce under the Natural Gas Act. With the exception of certain categories,[13] such dedicated gas remains subject to Section 7 of the Natural Gas Act and to the jurisdiction of the Commission under that Section. Since more than 40% of the estimated remaining recoverable gas reserves of the United States is now dedicated to interstate com-

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[13] See note 12, *supra*.

merce,[14] the question of the Commission's abandonment authority under Section 7(b) will continue to be significant for the foreseeable future under the NGPA. The question will not affect, however, the future production and sale of gas from new reserves not dedicated to interstate commerce before November 8, 1978, since such gas will not be subject to the provisions of the Natural Gas Act.

## SUMMARY OF ARGUMENT

1. The court of appeals held that lawful abandonment of certificated service under Section 7(b) of the Natural Gas Act was accomplished by the fact that production and delivery of gas had ceased from 1966 to 1971, even though the Commission did not authorize abandonment under Section 7(b) and was not even asked to do so at the time the abandonment allegedly existed. The court's holding is contrary to the plain language of Section 7(b), which provides that certificated service may not be abandoned "without the permission and approval of the Commission

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[14] Compiled from FERC Form No. 15 (18 C.F.R. 260.7), which is submitted annually by all jurisdictional gas pipeline companies, and from *Reserves of Crude Oil, Natural Gas Liquids, and Natural Gas in the United States and Canada as of December 31, 1977*, Vol. 32, p. 112 (June 1978), prepared by the American Petroleum Institute, American Gas Association and Canadian Petroleum Association. The Commission knows of no firm estimates of the amount of previously dedicated gas that is specifically exempted by the NGPA from the non-price regulation provisions of the Natural Gas Act. See note 12, *supra*.

first had and obtained, after due hearing, and a finding by the Commission that the available supply of gas is depleted * * * or that the present or future public convenience and necessity permit such abandonment." This Court has consistently held that Section 7(b) indeed requires the approval of the Commission before certificated service may be abandoned. *E.g.*, *Atlantic Refining Co.* v. *Public Service Commission (CATCO)*, 360 U.S. 378, 389 (1959); *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137, 158 n.25 (1960); *California* v. *Southland Royalty Co.*, No. 77-1114 (May 31, 1978), slip op. 7.

2. The court of appeals' decision is also contrary to basic principles of administrative law, which establish that reviewing courts are not empowered to engage in fact finding or other functions within "the domain which Congress has set aside exclusively for the administrative agency." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1974). Those principles have specific application in Section 7(b). By confiding the abandonment determination to the Commission, Section 7(b) seeks to accomplish several regulatory purposes: (1) ensuring a hearing in which all interested parties have an opportunity to explore the facts bearing on an application for abandonment, and ensuring that they have that opportunity at the relevant time, not years after the fact; (2) promoting certainty and reliability in the regulatory scheme by enabling producers, pipelines, customers, and prospective assignees of once-dedicated acreage to know whether or not

that acreage remains dedicated to interstate commerce; and (3) ensuring that abandonment questions will be decided in the first instance by an expert agency applying uniform standards. The holding of the court of appeals, that abandonment can be accomplished without Commission approval and without compliance with the requirements of Section 7(b), undermines these regulatory interests.

3. The court of appeals' holding rests on the incorrect factual assumption that all parties, including the Commission, acknowledged between 1966 and 1971 that the available reserves of gas were depleted. The Commission never so acknowledged. The letters from the Commission's Secretary, on which the court relied, insisted that the then-owners of the Butler B leasehold comply with Section 7(b) by filing abandonment applications, so that *the Commission* could determine whether abandonment was proper. Nor is there warrant for the court's assumption that the Commission would have granted an abandonment application if one had been filed between 1966 and 1971. No hearing was held on the question at that time, and the presently known fact that the reserves underlying Butler B are not depleted suggests, if anything, that the Commission would not have concluded that the reserves were depleted. In any event, speculation as to what the Commission might have done if the procedures of Section 7(b) had been observed is legally irrelevant. The statute requires that the procedures be observed.

4. The McCombs respondents argue that they properly sought abandonment by asking the Commission in this proceeding to authorize abandonment retroactively to 1966, that the court of appeals simply reversed the Commission on the legal question whether retroactive abandonment should have been authorized, and that the court was correct in so doing. But the court of appeals did not regard itself as reviewing a Commission determination under Section 7(b) that abandonment—retroactive or otherwise—was inappropriate; the court held that abandonment was accomplished by the fact that production ceased between 1966 and 1971, and that the procedures of Section 7(b) were not controlling. In any event, the Commission was fully warranted in rejecting the McCombs group's belated request for retroactive abandonment, and the court would have been in error in reversing that determination. For the Commission to have authorized retroactive abandonment in the circumstances of this case would have bypassed the procedures and undermined the purposes of Section 7(b) in many of the same ways as the actual holding of the court of appeals. It would have rewarded respondents, to the detriment of United and its customers, for failing to comply with the statute.

5. The Commission's control over abandonment under Section 7(b) of the Natural Gas Act is important to its continuing responsibilities under the Natural Gas Policy Act of 1978 and to the purposes of that statute. The NGPA provides that gas previ-

ously "committed or dedicated" to interstate commerce remains subject to the Commission's jurisdiction under Section 7 of the Natural Gas Act, and it sets ceiling prices for such gas that are considerably lower than the prices it sets for other categories of gas. The Act's definition of gas "committed or dedicated" to interstate commerce incorporates the results of Commission determinations of abandonment under Section 7(b) of the Natural Gas Act. The Commission's control of abandonment under Section 7(b) is thus essential in protecting the supply of "committed or dedicated" gas under the new Act. And the availability of such dedicated gas is important to the NGPA's purpose of enabling interstate consumers to rely on existing gas supplies at relatively low prices, at the same time as higher prices are allowed for new gas supplies in order to encourage exploration and development.

## ARGUMENT

### CERTIFICATED SALES AND SERVICE UNDER THE NATURAL GAS ACT CANNOT BE ABANDONED WITHOUT THE APPROVAL OF THE COMMISSION; NO SUCH APPROVAL WAS GIVEN HERE, NONE WAS EVEN REQUESTED AT THE TIME OF THE ALLEGED ABANDONMENT, AND THE COMMISSION DID NOT ERR IN REFUSING TO GIVE ITS APPROVAL RETROACTIVELY

#### A. In Dispensing With the Need for Commission Approval of the Alleged Abandonment, the Decision of the Court of Appeals Conflicts With the Plain Language of Section 7(b) And With Decisions of This Court

The court of appeals has held that the certificated service from the Butler B leasehold was lawfully abandoned between 1966 and 1971 even though the Commission never approved this abandonment and was not even asked to at the time it allegedly occurred. The court has ruled that the Commission's approval and the procedure specified in Section 7(b) of the Act were not required here. The court stated that "there was an abandonment under Section 7(b) of the Natural Gas Act which does not render the issue within the expertise of the Commission" (A. 31A); that "there was no need for the formality of a Section 7(b) hearing" (*ibid.*); and that "strict compliance with the non-abandonment language of [Section 7(b)] does not control under the facts and circumstances here" (*id.* at 32A-33A). The Act, however, gives a court no warrant for thus dispensing with the statutory requirements.

The requirements of Section 7(b) are plain. Certificated service may not be abandoned

> * * * without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

In this case the "permission and approval" of the Commission were never "had and obtained." There was no "due hearing," and no required "finding by the Commission * * *." In holding that there was nonetheless a lawful abandonment, the court of appeals has contravened the plain language of the Act.[15]

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[15] The court of appeals did not dispute the Commission's determination that the gas underlying Butler B had been dedicated to interstate commerce, or its consequent determination that, in the absence of a lawful abandonment under Section 7(b), respondents, as successors in interest to the leasehold, were required to continue the service of supplying gas to United. The Commission found that the 1953 gas purchase contract covered "merchantable natural gas * * * produced from all wells now or hereafter drilled" on the Butler B leasehold (Pet. App. A-32), and that the original and renewed certificates embraced "the merchantable natural gas produced from any depth and from all wells drilled through February 7, 1981," including "all of the gas which has been produced from or attributable to the Butler B lease since gas was rediscovered at deeper depths late in 1971" (*id.* at A-33).

The correctness of the Commission's determination has been confirmed by this Court's decision in *California* v. *Southland Royalty Co.*, No. 76-1114 (May 31, 1978). As the Court there stated (slip op. 5), "The initiation of interstate service

This Court has regularly held that Section 7(b) indeed requires the approval of the Commission before a certificated service in natural gas may be abandoned. In *Atlantic Refining Co.* v. *Public Service Commission* (*CATCO*), 360 U.S. 378, 389 (1959), the Court held that once a gas supply is dedicated to interstate commerce, "there can be no withdrawal of that supply from continued interstate movement without Commission approval." In *United Gas Pipe Line Co.* v. *FPC*, 385 U.S. 83, 89 (1966), the Court held that "[t]he statutory necessity of prior Commission approval [of abandonment], with its underlying findings, cannot be escaped." Most recently, in *California* v. *Southland Royalty Co.*, No. 76-1114 (May 31, 1978), the Court held (slip op. 7):

> Once the gas commenced to flow into interstate commerce from the facilities used by the lessees,

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pursuant to the certificate dedicated all fields subject to that certificate." The obligation of the McCombs respondents here to continue interstate deliveries from the leasehold unless they obtain abandonment authority under Section 7(b) is even clearer, it may be noted, than the obligation imposed on the lessors, and upheld by the Court, in *Southland*. The dissenting Justices in *Southland* argued that lessors of acreage dedicated by their lessee are not, at the termination of the lease, successors in interest for the purposes of the Commission's rule "that a purchaser or assignee charged with notice of the burdens imposed on the acquired estate by its former owner must seek abandonment approval under § 7(b)." *Id.*, dissenting opinion of Mr. Justice Stevens, slip op. 10, citing, *e.g.*, *Cumberland Natural Gas Co.*, 34 F.P.C. 132 (1965). Here, the McCombs group are indeed assignees of the Butler B leasehold and thus stand in the shoes of their predecessors who dedicated the gas from that tract.

> § 7(b) required that the Commission's permission be obtained prior to the discontinuance of "any service rendered by means of such facilities."

Thus, under Section 7 of the Act, "[t]he Commission may * * * control both the terms on which a service is provided to the interstate market and the conditions on which it will cease." Slip op. 4.[16]

In *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137 (1960), the Court addressed the very question of

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[16] The legislative history of Section 7(b) confirms that Congress intended the Commission to have this control over abandonment of service. Section 7(b) was adopted following testimony in support of such a provision by the General Solicitor of the National Association of Railroad and Utilities Commissioners. *Natural Gas Act: Hearings on H.R. 11662 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 74th Cong., 2d Sess. 92, 98 (1936) (testimony of John E. Benton). The bill introduced shortly after those hearings, H.R. 12680, 74th Cong., 2d Sess. (1936), included Section 7(b) in its present form. At subsequent hearings, a representative of several pipelines proposed that Section 7(b) be amended to add the proviso that "facilities may be abandoned without obtaining such permission, approval, or finding, if service is not thereby impaired or if substitute facilities will be installed." *Natural Gas Act: Hearings on H.R. 4008 Before the House Comm. On Interstate and Foreign Commerce*, 75th Cong., 1st Sess. 124, 127 (1937) (testimony of W. A. Dougherty). The amendment was opposed by the National Association of Railroad and Utilities Commissioners on the ground that it would "make the lawfulness of the abandonment * * * depend upon the state of mind of the utility effecting the abandonment." *Id.* at 143. The amendment was not adopted. Congress also declined to adopt an alternative, offered by the New York Public Service Commission, which provided that Commission approval of abandonment would be required only where the buyer of the gas did not consent to abandonment. *Id.* at 147.

the effect of a depletion of gas supply on the Section 7(b) abandonment obligation of the holder of a certificate of unlimited duration. The Court made it clear that the legal requirement of Section 7(b) obtained despite such depletion (*id.* at 158 n.25):

> It might be observed that in these cases the Commission issued certificates without time limitations. Thus if the companies, failing to find new sources of gas supply desired to abandon service because of a depletion of supply, they would have to make proof thereof before the Commission, under § 7(b). The Commission thus, even though there may be physical problems beyond its control, kept legal control over the continuation of service by the applicants.

The court of appeals in this case has eliminated the requirement that a certificate-holder who seeks "to abandon service because of a depletion of supply * * * would have to make proof thereof before the Commission, under § 7(b)." The court's decision conflicts with this Court's conclusion in *Sunray*.

**B. The Decision of the Court of Appeals Encroaches on the Commission's Jurisdiction and Undercuts the Purposes of the Act**

In depriving the Commission of its "legal control over the continuation of service by the applicants" (*Sunray, supra*, 364 U.S. at 158 n.25), the court of appeals has assumed the authority to make determinations that the Act confides in the Commission. The court held that the requirements of Section 7(b) can be bypassed, along with "the expertise of the Com-

mission" (A. 31A), when "the facts and circumstances" of a case (*id.* at 31A, 33A) make it appear that there is or was no more gas available from a particular tract. Section 7(b), however, states that *the Commission* must find, "after due hearing," that the available supply of gas is depleted or that the present or future public convenience or necessity permit abandonment.[17]

By thus intruding on the Commission's jurisdiction, the court of appeals has disregarded basic principles of administrative law. Those principles establish that reviewing courts are not empowered to engage in fact finding or other functions that are within "the domain which Congress has set aside exclusively for the administrative agency." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). Even on reviewing an agency's factual determination and holding it to be unsustainable on the record, the court may not itself undertake the fact-finding function that Congress has assigned to the agency, or prescribe the details of how the agency should perform that function on remand. *E.g.*, *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331-334

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[17] As Judge Holloway said in dissent (A. 35A, emphasis in original:

> It is the *Commission* that must make the required findings and give approval before abandonment is legally effected, and not private parties by their agreement on the facts as to depletion and their consent to discontinuation of service. Nor does the determination by another tribunal that abandonment has occurred, as a matter of law, satisfy § 7(b).

(1976); *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20-21 (1952).

Those principles have specific application in Section 7(b) of the Natural Gas Act, which seeks to accomplish significant regulatory purposes by allocating to the Commission the responsibility for making the determination on which an abandonment decision rests. First, the "due hearing" required by Section 7(b)—though viewed by the court of appeals as a "formality" (A. 31A)—assures an opportunity for consideration of the facts bearing on an alleged abandonment and gives all interested parties the right to be heard on the question. In the present case, for example, if an application for abandonment had been filed with the Commission between 1966 and 1971, the pipeline, United, could have participated in the Commission's determination of whether abandonment should be authorized.[18] The Commission and the parties would have been able to consider in that proceeding whether the leasehold had been explored sufficiently to warrant a finding that additional gas reserves could not be discovered.[19] In contrast, the

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[18] The letters from the Commission's Secretary to the lessee-producers in 1968 and 1971, advising that it would be necessary for them to file an application for abandonment if further sales were not contemplated, stated that the filing must include either a copy of an agreement with the pipeline cancelling the contract or "a statement from the [pipeline] indicating its position with respect to the proposed abandonment." Pet. App. A-97, A-100 to A-101.

[19] The Commission has recently refused to grant abandonment authority to a producer who failed to make such a

doctrine of judicially established de facto abandonment adopted by the court of appeals would preclude the Commission from considering the possibility of production from deeper reservoirs, and would go far toward excluding parties other than the producer from participating in determination of the factual questions.

The statutory hearing also assures that the Commission and interested parties will have the opportunity to consider these questions at the relevant time —the time when the depletion of reserves is claimed to exist—instead of years after the fact, when the lack of production at the time in question seems retrospectively inevitable. The decision of the court of appeals, with its retrospective finding that abandonment occurred "following the depletion of gas on December 5, 1966" (A. 31A), vests the abandonment determination, as a practical matter, in the certificate holders themselves. It empowers the court to convert their de facto termination of service into a de jure abandonment.[20]

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showing. *Texaco, Inc.*, FERC Docket Nos. G-8820, *et al.*, Order Granting Petition for Reconsideration and Modifying Prior Order, issued November 1, 1977, mimeo at 3.

[20] Although the court of appeals evidently believed that the Commission would have granted an abandonment application for the Butler B tract if one had been filed between 1966 and 1971 (see A. 31A-32A; pages 30-32, *infra*), the impact of its holding would be greatest in cases where the Commission's approval was most in question. To the extent that a producer seeking to terminate interstate service fears that the Commission would not grant his abandonment application, he has an incentive, under the court's decision, to terminate

Second, the requirement of filing for abandonment with the Commission promotes certainty and reliability in the regulatory scheme. It makes it possible for producers, pipelines, customers, and prospective assignees of once-dedicated acreage to know whether or not a given tract (and future production from it) remains dedicated to interstate service. The Commission order required by Section 7(b) provides a public, definitive, clear, and reliable determination of whether abandonment of service from particular acreage has occurred. In contrast, under the ruling of the court of appeals, abandonment may be established not only by an order of the Commission, but by "the fact" of actual or assumed depletion of dedicated reserves as that fact may potentially be certified by a court years later. It would often be uncertain whether particular facts met the test for de facto abandonment under the court's decision.[21]

Third, Section 7(b) ensures that abandonment questions will be determined in the first instance by

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service unilaterally, avoid facing the Commission, and trust that his fait accompli will look inevitable to a court some years later. Under the court's decision, producers have more to gain than to lose by failing to comply with the statutory requirement.

[21] Thus, it is unclear to what extent the court of appeals based its abandonment determination on the "cessation of production" in 1966, and to what extent on the "period of five years" without production that followed (A. 31A). One may wonder how long a period of nonproduction, if any, is needed before a court will retroactively determine that abandonment occurred.

an administrative tribunal applying uniform standards and its own expertise. In ruling that abandonment may be determined by any reviewing court, without an application to the Commission and on the basis of the court's own view of the facts, the decision of the court of appeals invites inconsistent decisions and standards by a multiplicity of tribunals. Those were among the problems that Congress sought to avoid by confiding abandonment determinations to the primary jurisdiction of the Commission. Cf. *United States* v. *Radio Corporation of America*, 358 U.S. 334, 346 (1959); *Thompson* v. *Texas Mexican Railway Co.*, 328 U.S. 134 (1946).

### C. The Assumptions Underlying The Decision Of The Court Of Appeals Are Factually Incorrect And Legally Irrelevant

The court of appeals' conclusion that abandonment had occurred "as a matter of law" rested on its assumption that between 1966 and 1971 all parties, "including the Commission," had "acknowledged" that the available reserves on the Butler B tract were depleted (A. 31A). The court's conclusion apparently also rested on its assumption that, on the basis of the facts known at the time, the Commission would have granted an abandonment application if one had been filed (*id.* at 31A-32A), so that "there was no need for the formality of a Section 7(b) hearing" (*id.* at 31A). These assumptions are incorrect.

The Commission never "acknowledged" that the available reserves were depleted. The letters from

the Commission's Secretary in 1968 and 1971 to Pagenkopf and Bay Rock, on which the court relied, did not express an opinion on the status of the reserves or the propriety of abandonment. To the contrary, those letters advised the producers that if further sales were not contemplated, "it will be necessary for you to file an abandonment application * * *" (Pet. App. A-97, A-100). Those letters were an insistence that the statutory procedure be complied with, so that *the Commission* could determine whether the supply of gas had been depleted or whether abandonment was otherwise warranted. They in no way suggested a waiver of that procedure, or justified dismissal of the procedure as a needless "formality." [22]

Nor is there warrant for the court's apparent assumption that the Commission would have granted an abandonment application if one had been filed between 1966 and 1971. Subsequent drilling has demonstrated that there was in fact an abundant reserve of gas underlying the leasehold. To be sure, the one rela-

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[22] Even if the Commission's Secretary had opined on the depletion of reserves or the merits of abandonment, which he did not, his opinion would not be binding on the Commission. Only the decisions of the Commission itself have legal effect. See *Minneapolis & St. Louis R.R. Co.* v. *Peoria & Pekin Union Ry. Co.*, 270 U.S. 580, 585 (1926); *Public Service Commission of New York* v. *FPC*, 503 F.2d 757, 776-777 (D.C. Cir. 1974). Thus, it has been held that an interpretation by the Secretary of the Interstate Commerce Commission of the abandonment provisions of the Interstate Commerce Act could not bind that agency. *Thompson* v. *Texas Mexican Railway Co., supra*, 328 U.S. at 146.

tively shallow well then producing on the leasehold ceased production in 1966. But this fact does not establish that the Commission, after a Section 7(b) hearing at which all interested parties would have had an opportunity to explore the facts, would have concluded that the reserves under the leasehold were sufficiently depleted to warrant abandonment.[23] The facts now known suggest, if anything, the contrary.[24] It is surprising for the court to conclude with such certainty that the Commission, if it had been asked to make the finding that the statute requires, would have found as a fact what is now known to have been false.

In any event, the court of appeals' assumption regarding what the Commission would have done if an abandonment application had been filed between 1966 and 1971 is legally irrelevant. As we have noted

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[23] The court noted that at oral argument the Commission's counsel had acknowledged that circumstances such as those attending the 1966 termination of service to United "have been acceptable evidence of depletion of gas for purposes of abandonment orders under Section 7(b)" (A. 32A). But since no application for abandonment was filed between 1966 and 1971, it is idle to speculate about what the factual evidence would have been, about whether the producer's evidence would have been rebutted, or otherwise about what the Commission might have done if an application had been filed. The controlling facts are that the original certificated obligation was still in force at the time it became clear that the gas supply underlying Butler B was not depleted.

[24] In a similar situation the Commission has recently declined to authorize abandonment. *Texaco, Inc.*, cited in note 19, *supra*.

(pages 27-30, *supra*), Section 7(b) mandates a procedure designed to assure that all interested parties may be heard on the abandonment question, that the Commission and the parties can address the issue at the time when the circumstances claimed to warrant abandonment actually exist, that persons in the industry may know whether gas from particular acreage remains dedicated to interstate commerce, and that abandonment determinations will be made according to uniform standards established and applied by the expert agency to which Congress has entrusted the task. The decision of the court of appeals, holding that there has been an abandonment on the basis of the court's speculation about how the Commission would have exercised its authority if it had been given the opportunity to do so, effectively nullifies the statutory procedure and the interests it serves. The statute requires that the Commission have the opportunity to exercise its authority under Section 7(b).

### D. The Commission Properly Refused to Authorize Retroactive Abandonment

We have argued in the preceding sections that the court of appeals erred in ruling that the cessation of production from 1966 to 1971 established a lawful abandonment of service, since under Section 7(b) only the Commission, by following the procedures set forth in Section 7(b), can consider and grant an application for abandonment. The McCombs respondents have claimed, however, that they did seek aban-

donment permission from the Commission by asking the Commission, in this proceeding, to authorize abandonment "retroactively as of 1966" (McCombs Br. in Opp. at 8). And the court of appeals, respondents contend, simply reversed the Commission on the legal question of whether the retroactive abandonment should have been granted (*id.* at 8-9).

This attempt to recast the case must fail. The court of appeals did not hold what the McCombs group claims it held, and any such holding would have been erroneous.

The court did not regard itself as reviewing a Commission determination under Section 7(b) that abandonment—retroactive or otherwise—was inappropriate. The court held, rather, that in the circumstances of this case it was proper to bypass the Commission's jurisdiction under Section 7(b). The court held that "there was an abandonment under Section 7(b) of the Natural Gas Act which does not render the issue within the expertise of the Commission" (A. 31A); that "there was no need for the formality of a Section 7(b) hearing" (*ibid.*); and that "strict compliance with the non-abandonment language of [Section 7(b)] does not control under the facts and circumstances here" (*id.* at 32A-33A). The court's ruling was not that an abandonment determination by the Commission should be reversed, but that on these facts there was no need for any Commission determination of the abandonment question. Under the court's view, "abandonment of the

service in the instant case was accomplished, as a matter of law" (*id.* at 33A), by virtue of the fact that production ceased for a period and by virtue of the court's assumption that "all of the parties" acknowledged at the time that the reserves were depleted (*id.* at 33A).

If the court of appeals had considered and reversed the Commission's refusal to authorize retroactive abandonment, that decision by the court would have been erroneous. As noted earlier (pages 27-30, *supra*), Section 7(b) mandates a procedure that ensures that the Commission and all interested parties will be able to examine the relevant facts at the appropriate time, and that promotes certainty with respect to the status of acreage from which gas has been produced and sold under a Commission certificate. The basis on which the McCombs group requested the Commission to authorize abandonment "*nunc pro tunc*"—"that the Commission should do now what should have been done in 1966" (A. 15A) —was inconsistent with these statutory purposes.[25]

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[25] In their Opposition to the Petition for Certiorari the McCombs respondents asserted the same basis for their claim, contending that the Commission erred in failing "to apply the Act retroactively as of 1966 * * * [i]n the light of the evidence existing at that time * * *." McCombs Br. in Opp. at 8. (In referring to "[t]he *only* evidence concerning the facts existing in 1966 * * *" (*id.* at 9, emphasis in original), respondents ignore the fact that different evidence might have been produced, by different parties, if an abandonment application had been filed and a hearing held in 1966 as Section 7(b) requires.)

The Commission therefore rejected the request, stating that "[w]hatever action the Commission may have taken under [Section 7(b)] from the time production ceased in 1966 until it was resumed in 1971, it cannot consider abandonment or abandonment *nunc pro tunc* where the supply of natural gas is not depleted" (Pet. App. A-31 n.25). The Commission upheld (*ibid.*) the ruling of its administrative law judge, who rejected the request on the ultimate ground that to grant it "would not be in the public interest" (A. 15A).[26]

The Commission's ruling was well within its discretion. To authorize retroactive abandonment on these facts, where the reserves were not presently depleted and where no application for abandonment had been made at the time they allegedly were depleted, would have the same effect as the actual holding of the court of appeals and would undermine the statutory purposes in many of the same ways. It would bypass the Commission's statutory function

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[26] The administrative law judge stated (*ibid.*; footnote omitted):

> There is no assurance that abandonment, if applied for in 1966, would have been granted or even unopposed. In any event, it is now clear that the deeper reserves underlying the Butler B tract were not depleted (there was no evidence either way in 1966). Those deeper reserves were also dedicated to interstate commerce under the original certificates. Consequently, it would not be in the public interest during the present emergency to authorize abandonment with the resulting loss of this vital and critical gas supply now needed by jurisdictional customers whose current requirements are being curtailed.

of exercising its Section 7(b) authority at the appropriate time, would deprive interested parties of their right to be heard on the abandonment question at that time, and would impair certainty and reliability by making the status of once-dedicated acreage subject to retroactive Commission pronouncements in the indefinite future. Moreover, it would undermine the statutory scheme by giving producers an incentive for failing to seek abandonment authority at the appropriate time, and would place the burden for failing to comply with the Section 7(b) requirements, not on the producers who omitted to invoke them, but on the interstate consumers for whose protection they were enacted. The Commission did not exceed its authority by declining to grant this extraordinary request, and any holding to the contrary by the court of appeals would have been erroneous.[27]

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[27] The cases cited by respondents in support of their claim that the Commission should have authorized retroactive abandonment do not support that claim. See *Plaquemines Oil and Gas Company* v. *FPC*, 450 F.2d 1334 (D.C. Cir. 1971); *Highland Resources Inc.* v. *FPC*, 537 F.2d 1336 (5th Cir. 1976); *Niagara Mohawk Power Corp.* v. *FPC*, 379 F.2d 153 (D.C. Cir. 1967), cited at McCombs Br. in Opp. at 8. None of these cases involved Section 7(b). *Plaquemines* and *Niagara Mohawk* applied the principle that a party may not evade the obligations of a statute by failing to comply with its procedural requirements, and that in such circumstances the Commission may fashion a remedy on the basis of the assumption that the requirements were complied with at the proper time. That principle supports the Commission's position here, where it is the retroactive action that respondents seek—not, as in those cases, the failure to act retroactively—that would reward respondents for having failed to do what the statute

**E. The Commission's Control Over Abandonment Under Section 7(b) of the Natural Gas Act Is Important to Its Continuing Responsibilities Under the Natural Gas Policy Act and to the Purposes of the New Statute**

As noted in the Statement (pages 14-15, *supra*), the Natural Gas Policy Act provides that future sales of natural gas that was dedicated to interstate commerce under the Natural Gas Act before November 8, 1978, will, in general,[28] remain subject to the provisions of the Natural Gas Act (other than the general rate-making provisions). NGPA Sections 2(18), 104, 106(a), 601(a). The NGPA sets ceiling prices for such dedicated gas (see Sections 104(b), 106(a)) that are, in general, considerably lower than the ceiling prices the NGPA provides for other categories of gas.[29] In Section 2(18), the NGPA extensively

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requires. *Highland* was a case where a producer failed to file an application in reliance on Commission statements that it was not required to do so. In the present case the Commission never informed respondents or their predecessors that abandonment authority was not required; rather, it twice informed them that abandonment applications had to be filed.

[28] Certain categories of such gas are excepted. See note 12, *supra*.

[29] See note 11, *supra*. For example, under Section 105, the December 1978 ceiling for an existing intrastate contract (undedicated gas) priced at or below $2,050 per million BTU's on November 8, 1978, is the lower of the contract price or $2,078 per million BTU's. 43 Fed. Reg. 56564 (1978). Under Section 104, the December 1978 ceiling for "flowing gas" dedicated to interstate commerce (*i.e.*, gas from a well drilled prior to January 1, 1973, and not otherwise covered), sold by a small producer, is $0.393 per million BTU's. *Id.* at 56561.

defines gas that is "committed or dedicated to interstate commerce," stating that the category basically includes "natural gas which, if sold, would be required to be sold in interstate commerce (within the meaning of the Natural Gas Act) under the terms of any contract, any certificate under the Natural Gas Act, or any provision of such Act" (Section 2(18)(A)(ii)).[30] Thus, whether gas will be deemed to be with-

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[30] One exclusion from Section 2(18)'s definition has particular relevance here. Section 2(18)(B)(iii) excludes from the definition gas that was not being sold in interstate commerce on May 31, 1978, if on that date neither the person who caused the gas to be dedicated to interstate commerce nor any successor in interest to that person (other than a reversionary lessor) had any right to explore for, develop, produce, or sell such gas. Thus, if sales in interstate commerce from particular dedicated acreage had ceased prior to May 31, 1978, and if the lease had reverted to the landowner by that date, future gas production from that acreage will not be subject to the Natural Gas Act. (The Conference Reports accompanying the NGPA state that the purpose of the exclusion is to "limit[] further extension" of this Court's holding in the *Southland* case, *supra*, but that the case "is not * * * reversed on its facts." H.R. Rep. No. 95-1752, 95th Cong., 2d Sess. 71-72 (1978); S. Rep. No. 95-1126, 95th Cong., 2d Sess. 71-72 (1978).)

The exclusion is relevant here in two ways. First, it indicates that, contrary to the decision of the court of appeals, the fact that gas from previously dedicated reserves has ceased to flow does not, by itself, effect an abandonment of the certificated service. If that were true, there would be no meaning in the exclusion's second condition that the person presently entitled to produce the gas not be the person who dedicated it or any successor in interest to that person. Second, the exclusion implies an affirmative intent and understanding by the Congress that gas remains dedicated to interstate commerce, even though it had ceased to flow by

in the "committed or dedicated" category under the NGPA—and therefore subject to the lower price ceilings established for such gas and to the non-rate jurisdiction of the Commission—will depend on, among other things, whether an abandonment has occurred under Section 7(b) of the Natural Gas Act.[31]

NGPA's definition and treatment of "committed or dedicated" gas are central to its statutory scheme and underscore the continuing significance of the abandonment provision of Section 7(b) of the Natural Gas Act and the Commission's role in administering that provision. A principal purpose of the new statute is to encourage the development of new reserves by permitting "new gas" (Section 102(c)) and other specified categories to be sold at higher prices than the prices prevailing under presently certificated contracts. But at the same time, in order to mitigate sharp and sudden increases in the price of gas, the Act enables pipelines and other interstate customers to continue to rely for a number of years on the very large supplies of gas that are presently dedicated to

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the specified date, if the person presently entitled to it *is* a successor in interest to the person who dedicated it. In this case, of course, the McCombs group as owners of the Butler B leasehold interest are successors in interest to the person (Bee Quin) who originally dedicated the Butler B gas to interstate commerce. See note 15, *supra*.

[31] This fact is expressly reflected in a provision of Section 2(18) which excludes from the definition of "committed or dedicated" gas natural gas "for which abandonment of service was granted before the date of enactment of this Act under section 7 of the Natural Gas Act." Section 2(18)(B)(ii).

interstate commerce [32] and hence must be sold at lower rates.

To achieve this purpose, the Act continues the Commission's jurisdiction over such gas under Section 7 of the Natural Gas Act, including in particular the abandonment provision of Section 7(b). If the Commission is to carry out that continuing responsibility and assure that pipelines and other interstate customers will continue to have available supplies of previously dedicated gas, as Congress intended in the NGPA, the Commission must maintain control over the abandonment of interstate service as that control is established by Section 7(b) of the Natural Gas Act. The decision of the court below, by undermining the Commission's control over abandonment, is thus inconsistent with the Natural Gas Policy Act as well as the Natural Gas Act.

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[32] As noted at page 15-16 and note 14, *supra*, gas "committed or dedicated" to interstate commerce, such as the gas involved in this case, constitutes a substantial portion—probably more than 40%—of the estimated United States reserves.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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